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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted]

[redacted]

ALBERT ANDREW VESSEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

[redacted]

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

# Supreme Court of the United States

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No. _____

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GLEN ANDREW VIRDEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

The Petitioner, GLEN ANDREW VIRDEN, respectfully prays that a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 9, 1970.

## OPINION BELOW

The Opinion of the Court of Appeals has not been reported, but has been rendered and appears in the appendix hereto. No opinion was rendered by the District Court for the Southern District of Texas.

## JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on November 3, 1970. A timely petition for rehearing was denied on December 9, 1970, and this Petition for Certiorari is filed pursuant to an application for an extension of time. This Court's jurisdiction is involved under 28 USC 1254 (1).

## STATUTORY PROVISIONS INVOLVED

Title 15, United States Code, Sections 902(e), 902(f) and 903(a).

Section 902(e) states:

It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

Section 902(f) states:

It shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate commerce . . .

Section 903(a) states:

Any person violating any of the provisions of this chapter or any rules and regulations promulgated hereunder or who makes any statement in applying for the license or exemption provided for in this chapter, knowing such statement to be false shall upon conviction thereof, be

fined not more than $2,000.00 or imprisoned for not more than five years, or both.

The statutes codified at §§902 and 903 of Title 15 have, subsequent to the offenses here charged, been repealed. The Prosecution survives, however, by virtue of the Act of July 30, 1947, c. 388, §109, 61 Stat. 633 (Title 1, USC §109).

## QUESTIONS PRESENTED

1. Whether or not the Federal Firearm Statutes in question are unconstitutional in that they violate several of the appellant's rights under the following amendments:

Under the FIFTH AMENDMENT:

A. Because a subsequent trial for an offense which offense has one of its elements being a more indictment for a crime that might possibly carry a punishment of jail term for a period greater than one year or which offense has as an element a prior conviction by the Appellant of a crime which might also possibly carry a punishment of jail term for a period greater than one year directly places the Appellant in jeopardy more than one time for the same crime thus violating the Fifth Amendment of the United States Constitution to the prejudice of the Appellant.

B. Because the very nature of the Statute, as evidenced by its constituent elements, coerces and forces a Defendant to give testimony against himself, or alternatively to be a witness against himself, even though he has voluntarily chosen and elected to exercise his Fifth Amendment right not to take the stand and testify in his own behalf.

Under the EIGHTH AMENDMENT:

Because the statute in question, by its inate nature and wording, uses a former prior conviction for any crime which might possibly carry a penalty of greater than one year in jail, regardless of the sentence imposed by law and regardless of the subsequent payment and satisfaction of the debt imposed upon him by society which he had previously fully paid to society constitutes a cruel and unusual punishment.

Also, because the elements of the statute require that a former conviction have pillared upon it a subsequent act by the Defendant which act if done by another person would not result in a completed criminal offense.

Under the THIRTEENTH AMENDMENT:

Because Appellant's former state conviction is being presently used by the United States as a continuing condition of servitude.

Under the FIFTEENTH AMENDMENT:

Because the United States will have in effect denied and abridged the Appellant's Constitutionally given right to vote on account of the Appellant's previous condition of servitude to the State of Texas if he is incarcerated in a Federal Penitentiary for this charge.

Under the FOURTEENTH AMENDMENT:

Because justice of the case is primarily vested in the United States District Court situated in Phoenix, Arizona, and because Appellant was denied the right to fair and impartial jury in the State and District wherein the alleged crime was committed.

Under the NINTH AMENDMENT:

Because there is a fundamental natural right of free men in a free country to travel between the states of this country and to carry or transport their personal possessions with them and that this fundamental natural right of a man is a more sacred, highly regarded right that the grossly abused right allowed the Congress of the United States to generally regulate commerce.

Under the TENTH AMENDMENT:

Because the Constitution of the United States neither expresly nor impliedly vests in the United States Congress the right or ability to prescribe, alter, amend or extend a final fully satisfied criminal judgment imposed upon the Appellant by the Great State of Texas, and that this right is expresly left to the State of Texas or to her people by the Constitution of these United States.

II.

That there is insufficient evidence to sustain a lawful conviction for reason that any act the Appellant may have done, if he did any, in picking up the firearm at the R.E.A. terminal, if he did, was purely an intrastate act.

III.

There is insufficient evidence to sustain a lawful conviction in that there is insufficient proof that Appellant, if he did, did so knowingly and unlawfully.

IV.

The Court erred in its refusal to sustain Appellant's objection to the testimony of Agent Whatley, concerning

an alleged oral statement in the fact of Appellant's refusal to sign "Waiver of Right to Remain Silent and of Right to Advice of Counsel" Exhibit D1 and G12.

The Court erred further in its refusal to strike the testimony of Agent Whatley and instruct the Jury to disregard the same.

V.

The Court erred in its refusal to sustain Appellant's objection to the testimony of the Jefferson County, Officer, concerning his custody in Jefferson County, Texas, for the offense of Auto Theft and erred further in allowing into evidence and to be exhibited to the Jury, Government's Exhibit 11, to wit: Appellant's Jefferson County Rap Sheet showing his arrest and charge of Felony Auto Theft, which was proffered by the government upon their case in chief and not upon the cross examination of the Appellant.

The Court further erred in its refusal to strike the testimony of the Jefferson County Officer and also Government's Exhibit 16, and instruct the jury to disregard the same.

## BRIEF STATEMENT OF THE CASE

The Government by virtue of its indictment, contends that Appellant, being a person who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; did knowingly and unlawfully transport the firearm in question from Houston, Texas to Phoenix, Arizona; that he did knowingly and unlawfully ship and transport and cause to be shipped and trans-

ported in interstate commerce, in that he received it in Houston, Texas, after it had been shipped, and transported from Phoenix, Arizona.

Briefly, the facts are as follows:

The chattel in question was allegedly transported from Houston, Texas, to Phoenix, Arizona, pawned to a pawnbroker in the City of Phoenix, Arizona, and sometime later the gun was shipped to Houston, Texas by REA Express. The pistol was called for and picked up at the REA Express Office in Houston, Texas. Allegedly, the person who transported the gun pawned it in Phoenix, Arizona, caused it to be sent to Houston, Texas, and who picked it up at the REA Terminal in Houston, Texas, was Glen Andrew Virden, the Appellant.

## REASONS FOR GRANTING THE WRIT

Under the Fifth Amendment to the United States Constitution, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". This principle, though it is an outcropping from the Magna Carta and the statute of Queen Anne, comes to American Law as a result of having been deeply embedded in the minds of free men and constitutes foundation elements of constitutional law. Students of law sharply frown upon a person being twice placed in jeopardy for the same offense.

It has been uniformly construed to form an insurmountable barrier to a second prosecution where there has been an acquittal or a conviction, regularly had upon a sufficient indictment. Consequently, we have the accepted doctrine of: autre fois acquit and autre fois convict.

In this case, the indictment upon which the appellant was brought to trial, a quotation from the indictment: *"Being a person who therefore had been convicted of a crime punishable by imprisonment for a term exceeding one year"*. The former conviction is a distinctly separate offense and wholly unrelated to the act immediately complained of in the indictment in this case, and yet the former conviction is used as the foundation or basis upon which the immediate act is pillared, to create a violation, and yet without the former conviction, there is no violation, and the immediate act is a nullity.

As to another person, committing the same offense as the appellant, if appellant did, there would be no violation. However, the statute in question *only applies* to a person, *"who theretofore has committed a crime punishable by imprisonment for a term exceeding one year"*. In other words, as to a person charged under this particular statute, the only individual who of necessity could be charged, *is one who has been convicted of an offense punishable by imprisonment for a term exceeding one year*, thereby bringing out his former conviction, and using it as the basis or foundation upon which to pillar a violation.

Plainly, without the former conviction, a person who would commit the same act could and would not be chargeable under this statute, only one who meets the requirements of the former conviction coupled with the new action, in order to make the offense, could be charged. Great care and caution must be exercised in order not to confuse this statute with one which in its nature is recidivist.

Under a recidivist statute, designated authority, is dealing with a *repeater of like or similar offenses*, which

must be distinguished from the character of the case at bar, wherein the statute, per se, only carries an offense against one who has been formerly convicted and who had theretofore been convicted of a crime punishable by imprisonment for a term exceeding one year, and, it is no offense when committed by one who has not been thusly convicted.

A twilight zone case that comes *between and betwixt* is the case of *Doggett v. State*, 93 S.W.2d 399, wherein the defendant was charged with robbery and murder. The robbery and murder had come out of the same offense. He was tried and convicted of the robbery, and later tried for murder. The court sustained the appellant, in that the facts were identical and, having been tried for the robbery, therefore to try him for murder would constitute jeopardy.

In this case, further, the court called attention to the case of *Taylor v. State*, 55 S.W. 961, wherein the court says: "We think the rule is well established that when one offense is a necessary element in, and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other." Appellant is not so naive as to attempt to tell the court that his former conviction and the immediate act in the case at bar contain identical facts or that one is a part of the other; however, appellant strongly believes his former conviction is the basis of the violation against him, upon which the immediate act, by statute, is pillared, and that without the former conviction, there would be no offense, and that he is being placed twice in jeopardy and repunished for a former satisfied state conviction by a Court of the United States and that this is not only contrary to the Tenth

Amendment but must again be distinguished from the nature of a recidivist statute.

In the *Doggett* opinion, the court further referred to *Moore v. State*, 255 S.W. 1120, wherein the court says: "The case of Moore v. State, 33 Tex. Cr. R. 166, 25 S.W. 1120, 1121, further illustrates the soundness of the appellant's contention. The conviction in that case was for assault with intent to murder. At a preceding day of the term Moore had been convicted of the offense of robbery from the same person. Upon the conviction last mentioned he predicated the plea of former jeopardy. In the course of the opinion it was said: 'It has been well said that 'the assault or violence in the robbery case being an essential element or ingredient of the offense, and constituting an important and material part of that offense, as it does in the offense of assault with intent to commit murder, and having been once punished in the robbery case, as a material part thereof, it cannot be again punished, as it would be if the judgment below were allowed to stand'. Appellant concedes that the point is not analogous in character and yet it is analogous in that it clearly frowns upon a person being twice placed in jeopardy for the same offense.

Can reasonable minds differ upon the theorem that a person who has thus been convicted within the statute is not being twice punished. Had he not been thusly convicted, he would not have been charged, for reason that there would be no offense. And clearly it is not the repetition of a like or similar offense.

Further, without appellant ever taking the stand, ab initio, in the reading of the indictment, the bucket tips and out comes his former conviction. Appellant, without

having taken the stand, has been in a sense, subjected to cross examination as to a felony conviction. The reading of the indictment, *blinds the trier of the facts and discloses appellant's record, before he, appellant, does anything. He is stripped in the alpha, and upon the threshold of the omega, a former conviction cuts sharply at his credibility if he testifies, and if he does not testify the cut against him is sharper.*

How much more cruel can the statute be, when it takes a former conviction and pillars upon it an offense, which if done by another, would be no offense. It must be borne in mind that this is not a repeater statute, such as a second offender or an habitual. In other words, it is not recidivist in character, to say the least it is a form of cruel and unusual punishment. *Pearce v. North Carolina*, 23 L.Ed.2d 665; *Farrell v. State*, 406 S.W.2d 440, and 445 S.W.2d 729.

Has appellant been deprived his liberty, without due process of law and without equal protection of law by pillaring an offense upon a former conviction as a result of a conduct, which, without the former conviction would be no offense. Is an ex-convict, who meets the requirements of the statute, being tried in servitude, because of said former conviction. *Any conviction carries servitude only to the limitation of satisfying the judgment of the court and no further, and to do otherwise is to hold a conviction as a form of continuing servitude long after the judgment has been satisfied, if this be true, then the graves of the authors of Magna Carta and the Constitution would shudder in their grave.*

The Appellant would thus contend that unless this Court grants this Writ that the United States will in effect

be allowed to use his former state conviction as a continuing condition of servitude *to the people of the United States* contrary to the Thirteenth Amendment to the United States Constitution.

Similarly, if the United States eventually would incarcerate the Appellant pursuant to "final conviction" in this Court, the Government will have in effect denied the Appellant his Constitutional right to vote on account of Appellant's previous condition of servitude to the people of the State of Texas.

In support of his contentions, Appellant has been denied due process. Appellant cites the case of *Lane v. Warden, Maryland Penitentiary*, cited in 320 Fed. 2d, page 179. Lane had been tried in the State Court of the State of Maryland, as an habitual criminal. He was convicted and after denial of certiorari in the United States Supreme Court, he filed a writ of habeas corpus, which was ultimately passed on by the Court of Appeals for the Fourth Circuit. Pursuant to the Maryland practice, each of the three indictments are very common additions to the facts of the particular offense for which he has to be tried and details of two prior convictions of the Maryland narcotic law. Indictments, in their entirety, were read to the jury, at the outset of the trial. Lane complained that informing the jury of his previous convictions at the outset of the trial deprived him of a fair and impartial hearing. This contention was rejected and convictions were affirmed and certiorari was denied, 7 L.Ed. 2d 529. In a later period he filed his writ of habeas corpus, again contending that under the 14th Amendment he was denied a fair hearing before the jury, by the prosecutor informing the jury, at the beginning of the trial, of his

alleged prior convictions. The law has been well established that evidence or allegations of prior crimes are inadmissible either to establish guilt or to show that the defendant would be likely to commit crime with which he is charged, *Michaelson v. United States*, 93 L.Ed. 168. The rule in its rational were well explained and approved in the Michaelson case. A well settled rule is *United States v. Penix*, 313 Fed. 2d 524, and *Walker v. United States*, 104 Fed. 2d 465. Wherein both cases the rule is established and undisputed that when a defendant takes the stand in his own behalf, of necessity, he submits himself to cross-examination, thorough interrogation and in so doing further submits himself for the purposes of impeachment. Along this line of putting before a trial jury any part of the defendant's past or record, the case of *Marshall v. United States*, 3 L.Ed. 2d 1250. The defendant never took the stand and the court refused to let the Government put the defendant's record before the jury, however, some of the jurors become exposed to a newspaper story and thereby learning of defendant's past, the court by its own motion, granted a new trial. *United States v. Jacangelo*, 281 Fed. 2d 574, the mistrial was granted or resulted for the reading to the jury of co-defendant's confession *containing reference to the defendant's previous convictions*, where the harmful remark would have been readily deleted without destroying the usefulness of the confession and evidence of its author's guilt. In the *Jacangelo* case direct reference was made to the *Marshall* case. In *Holmes v. United States*, 284 Fed. 2d 716, during the recess at night, the U. S. Marshall, upon inquiry by a juror as to where the defendant would be staying, remarked that he would be staying at jail serving time for reason that he was serving time on another sentence,

was held so highly prejudicial that the court granted an immediate mistrial. Recognizance of prejudicial effects of information as to the defendant's prior convictions has not, however, been confined to the Federal Courts. As early as 1929 the Connecticut Supreme Court of Errors in *State v. Ferrone*, described your new rule in order that defendant's prior record would not reach the jury upon their determination of innocence or guilt on the primary count and for which count the defendant would be put to trial. It must be noted that in the *Lane* case and the *Michaelson* case, that information of a character generally acknowledged to be prejudicial to a criminal accused was revealed to the jury *before any evidence was afforded. In this it is analogous to the case at bar, in that, ab initio, the jury is informed that he, appellant, is an ex-convict.* This is not after he has taken the stand and this is not after he has been subjected to cross-examination, and not for the purpose of impeachment, *but to the contrary, in limine*, it is a part of the indictment upon which the offense by statute is pillared. The greater weight of the offense or the greater weight of the charge or the greater weight of that with which the defendant is charged and being put to trial on, *is the former conviction. Palco v. Connecticut*, 82 L.Ed. 288, the case clearly states the right to a fair trial, which is one of those rights which have been found to be implicit in the concept of ordered liberty. The denial of a fair and impartial trial as guaranteed by the 6th Amendment of the Constitution, is also, by stating it thusly, a denial of due process under the 5th and 14th Amendments. Appellant further cites the case of *Salmon Michaelson v. United States*, 93 L.Ed. 168, not that it is a case in point, however, it is a case in point in part in that, with the qualifications that the injuries complained

of in the *Michaelson* case was brought out on cross-examination and whereas the injury in the case at bar is an integral and basic part of the indictment. For a long time our courts have followed the common law tradition to disallow resort by the prosecutor to any kind of evidence of defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character but it simply closes the whole matter of character, disposition, and reputation *in the presentment of the prosecutor's case in chief*. They cannot show defendant's prior trouble with the law, specific criminal acts, or ill name amongst his neighbors, even though such facts might logically be persuasive that he is by preponderance a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant, on the contrary, it is said to weigh too much with a jury and to so over persuade them as to prejudge one with a bad criminal record *and deny him a fair opportunity to defend against a particular charge. Greer v. United States*, 62 L.Ed. 469.

Under Article 38.29, Texas Code of Criminal Procedure, indictment, information or complaint in not admissible to impeach a witness, the fact that a defendant in a criminal case, or a witness in a criminal case, is or has been, with a commission of an offense against the criminal laws of this state, of the United States, or any other state, shall not be admissible in evidence, in the trial of any criminal case for the purpose of impeaching any person, as a witness, unless, on trial under such indictment, has resulted, or such person has been placed on probation or a suspended sentence has been given and has not been set aside, or such person has been placed on probation and the period of probation has not

expired. In trial, of defendant, under Article 36.09, it may be shown that the witness is presently charged with the same offense as the defendant, in whose trial he appears as a witness. Appellant would further ask this Court to grant a Writ of Certiorari because there is a fundamental natural right of men to travel between the states of this country and to transport their personal possessions with them. This Court must find that this right is a more highly regarded sacred right of man than the grossly abused right given the Congress of the United States to generally interfere with travel between sister states of this Nation.

If the Court does not grant this Writ and overturn the decision of the Court below, many American citizens will in effect be branded as Federal Criminals. An eighteen or nineteen year old youth who is convicted of Driving while Intoxicated in Texas may not carry his gun into a sister state to hunt game for the remainder of his life without exposing himself to criminal liability. This is far too harsh a penalty to impose upon the people of this country because Congress has decided that *any* person regardless of the sentence imposed upon him or the finality of that sentence or the nature of the crime involved may not ship, transport, or receive a firearm in interstate commerce if the possible penalty for the previous crime was greater than one year in jail.

Counsel would point out that in the State of Texas many misdemeanors carry a punishment of greater than one year in jail—but there is no rational nexus for the Congress of the United States to say that those who have been convicted of these crimes or given probation for these crimes many of which are non violent crimes, should

not be able to carry a firearm across a state line. The people of these United States and particularly the people of the State of Texas value the right to possess and transport firearms too highly.

The Congress of the United States has in effect created a law which the Government now seeks to enforce against the Appellant which neither expressly nor impliedly vests a power in Congress to prescribe, alter, amend, or extend a final fully satisfied criminal judgment imposed upon the Appellant by the State of Texas which convicted him of a state crime. This is in direct conflict with the Tenth Amendment of the United States Constitution which Amendment was a deliberate withholding of such power by the States and by the people of these States which power was expressly withheld from the Congress to prevent such an abuse of Congressional power as we presently have in the case at bar.

The District Court has jurisdiction of the subject matter, which takes place within its district, conceding nothing, but for argument, a chattel in interstate commerce loses its interstate character and becomes intrastate at point of resting.

The statute in question, states, knowingly and unlawfully; there is a well accepted legal maxim:

"Expressio unius exclusat alterius"

This burden has never been discharged. That which is specifically required must be expressly proved excluding all other contentions.

Reference is made to *Miranda v. Arizona*, 16 L.Ed. 2d 694, in that, the rule is prescribed, for the taking of a confession and the standard to be used by police agencies.

Is the Miranda rule for the taking of a statement, applicable to all police agencies? To contend otherwise, or to limit its application would be to readopt the silver platter doctrine as overthrown by *Elkins v. United States*, 4 L.Ed. 2d 1669.

In conclusion, appellant contends, that the statute complained of is violative of his rights as guaranteed him by the United States Constitution, as hereinabove mentioned, and to say the least, the statute is violative of every sacred right, orderly society clings too under the law of conscience. The rule of decision is the history of man's experience, seasoned and cultivated, with wisdom and compassion illuminated by divine providence.

Appellant prays that upon the grevious errors complained of, the argument advanced and the authorities cited, the case be reversed, appellant ordered discharged and the statute complained of be found unconstitutional.

Respectfully submitted,

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## APPENDIX A

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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NO. 28,683

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GLEN ANDREW VIRDEN,
Defendant-Appellant.

---

*Appeal from the United States District Court for the Southern District of Texas*

---

(November 3, 1970)

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Before COLEMAN, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM: The appellant, Glen Andrew Virden, was charged in an indictment of three counts with the offenses that, being a person who had previously been

convicted of a crime punishable by imprisonment for a term exceeding one year, he unlawfully (1) transported a Norwegian chrome plate 11.25 mm 1.45 caliber automatic pistol in interstate commerce from Houston, Texas to Phoenix, Arizona; (2) caused the same firearm to be shipped back from Phoenix to Houston together with another firearm, an Astra 9 mm. automatic pistol; and (3) received these firearms in Houston, knowing them to have been transported un-lawfully from Phoenix, all in violation of 15 U.S.C.A. §902(e) and (f) and 905(a). He was acquitted on the first count but convicted on the latter two.

The statutes codified as §§902 and 905 of Title 15 have, subsequent to the offenses here charged, been repealed, and the crimes of the nature involved are now covered by 18 U.S.C. §§922-924. The prosecution survives, however, by virtue of the Act of July 30, 1947, c. 388, §109, 61 Stat. 633 (Title 1 U.S.C. §109).

The evidence of record, if believed by a jury, as it was on two counts, is sufficient to support the convictions.

Counsel for appellant has diligently raised and vigorously argued many assertions of error. We find these contentions to have been settled adversely to Virden by *Smith v. United States*, 10 Cir., 1963, 312 F.2d 119, and *DePugh v. United States*, 8 Cir., 1968, 393 F.2d 367, cert. den. 393 U.S. 832.

The judgment of the District Court is

AFFIRMED.

APPENDIX B

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

NO. 28,683

D.C. Docket No. Cr. 69-H-221

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GLEN ANDREW VIRDEN,
Defendant-Appellant.

*Appeal from the United States District Court for the Southern District of Texas*

Before COLEMAN, AINSWORTH, and GODBOLD, Circuit Judges.

## JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 3, 1970

Issued As Mandate:

## APPENDIX C

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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NO. 28,683

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GLEN ANDREW VIRDEN,
Defendant-Appellant.

---

*Appeal from the United States District Court for the Southern District of Texas*

---

(December 9, 1970)

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ON PETITION FOR REHEARING

Before COLEMAN, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 1283

GLEN ANDREW VIRDEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts of violating 15 U.S.C. 902(e), (f) and 905(a), which prohibit the interstate shipment and receipt of firearms by an individual who has been convicted of a crime punishable by imprisonment for a term exceeding one year.[1]

[1] The statutes underlying petitioner's offense have been repealed by Section 906 of Title IV of the Omnibus Crime

He was sentenced to imprisonment for thirteen months. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that, on January 22, 1968, a Norwegian Colt .45 pistol was pawned at the International Arms and Pawn Shop (International) in Phoenix, Arizona. The business records of International and the testimony of the employee who completed the transaction show that the person depositing the weapon signed as Glen Virden (App. 14-25).[1] A request for redemption of the pistol was mailed to International (App. 31). On February 13, 1968, the weapon was sent to Houston, Texas via Railway Express Company (App. 33-37). The consignee was notified and, on March 1, 1968, a person identifying himself as Glen Virden received the package at the Houston Railway Express Office (App. 43-50). A handwriting expert testified that the signatures on the business records of International were the same as on a document which was known to have been signed by petitioner (App. 76-79, 83-84).

Agent Whatley, a special investigator with the Alcohol, Tobacco and Firearms Division of the U.S. Treasury Department, also testified that petitioner had made incriminatory admissions regarding his knowledge of the weapon during an interview. The agent testified that he warned petitioner of his con-

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Control and Safe Streets Act of 1968, 82 Stat. 234. Crimes of the nature involved in the present case are now dealt with in 18 U.S.C. 922-924. The prosecution survives by virtue of 1 U.S.C. 109.

[1] We are lodging with the Clerk a copy of Appellant's Appendix (App.) of the Record on Appeal.

stitutional rights prior to any questioning. Thereafter petitioner agreed to talk and made incriminatory admissions (App. 86-89, 113-121).[1]

Petitioner contends that the statute under which he was convicted is unconstitutional. He asserts that his Fifth, Eighth, Ninth, Tenth Thirteenth, Fourteenth, and Fifteenth Amendment rights have been violated. Many of his claims, such as the argument that he is being subjected to involuntary servitude (Pet. 4) are frivolous. Others, such as the assertion that there is no rational basis for punishing persons, convicted of non-violent crimes, for transporting firearms in interstate commerce (Pet. 16), have been soundly and consistently rejected. *E.g.*, *Williams* v. *United States*, 426 F. 2d 253 (C.A. 9), certiorari denied October 26, 1970 (No. 5552, this Term); *United States* v. *Thoresen*, 428 F. 2d 654 (C.A. 9); *United States* v. *DePugh*, 266 F. Supp. 453 (W.D. Mo.), affirmed 393 F. 2d 367 (C.A. 8), certiorari denied, 393 U.S. 832; *Reddy* v. *United States*, 403 F.2d 26 (C.A. 1), certiorari denied, 393 U.S. 1085; see also *United States* v. *Symes* (C.A. 8), No. 20,438, decided February 1, 1971.

Petitioner also alleges, without elaboration, that the evidence was insufficient and that his statements to Agent Whatley should have been suppressed. These

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[1] It was stipulated at trial that petitioner previously had been convicted in Texas of a felony and sentenced to imprisonment for one year (App. 12-13).

contentions are, in light of the evidence summarized above, clearly insubstantial.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

MARCH 1971.

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[4] Petitioner's objection (Pet. 6) to the introduction of Government Exhibit II, his arrest sheet on another offense, is similarly baseless. The exhibit was admitted only as to the signature thereon (App. 71-72), which was one of those used by the handwriting expert in making his identification (App. 78-84).

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